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No. 94-932

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

STANLEY H. CARUSO

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. SHOULD CERTIORARI BE DENIED WHERE THE COURT BELOW BASED ITS DECISION ON INDEPENDENT AND ADEQUATE STATE GROUNDS, NAMELY THE MICHIGAN CONSTITUTION AND MICHIGAN CASE LAW?

II. SHOULD CERTIORARI BE DENIED WHERE THE MICHIGAN SUPREME COURT PROPERLY DECIDED AS A MATTER OF DUE PROCESS THAT THE IN CAMERA INSPECTION OF PRIVILEGED RECORDS SHOULD BE AVAILABLE IN AN APPROPRIATE CASE IN ACCORDANCE WITH APPLICABLE FEDERAL CASE LAW AND THE DECISIONS OF THE MAJORITY OF THE STATES?

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NOW COMES the Respondent, Stanley H. Caruso, by his attorney, Sara E. Vander Werff, counsel of record, and prays that the writ of certiorari requested be denied, such that the opinion by the Michigan Supreme Court entered August 29, 1994, be upheld. The Michigan Supreme Court properly held that a statutory psychological-patient privilege yields to a defendant's constitutional right of due process. To balance the interests of the need for confidentiality and the Constitutional Right, if defense demonstrates a good faith belief and a reasonable probability that material information may be in the counseling records, the trial judge may require the complainant to waive the privilege for an in camera review, or the judge may refuse to allow the complainant's testimony at trial.

STATUTE INVOLVED

MCL 330.1750; MSA 14.15(800)(1750) provides in pertinent part:

> (1)(c) "Privileged communication" means a communication made to a psychiatrist or psychologist in connection with the examination, diagnosis, or treatment of a patient, or to other persons while they are participating in the examination, diagnosis, or treatment.
>
> (2) Privileged communications shall not be disclosed in civil, criminal, legislative, or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings, unless the patient has waived the privilege, except in the circumstances set forth in this section.
>
> (3) Privileged communications shall be disclosed upon request:
>
> (a) When the privileged communication is relevant to a physical or mental condition of the patient which the patient has introduced as an element of his or her claim or defense in a civil or administrative case or proceeding or which, after the death of the patient, has been introduced as an element of his or her claim or defense by a party to a civil or administrative case or proceeding.
>
> (b) When the privileged communication is relevant to a matter under consideration in a proceeding governed by this act, but only if the patient was informed that any communications could be used in the proceeding.
>
> (c) When the privileged communication is relevant to a matter under consideration in a proceeding to determine the legal competence of the patient or the patient's need for a guardian but only if the patient was informed that any communications made could be used in such a proceeding.
>
> (d) In a civil or criminal action against the psychiatrist or psychologist for malpractice.
>
> (e) When the privileged communication was made during an examination order by the court, prior to which the patient was informed that a

communication made would not be privileged, but only with respect to the particular purpose for which the examination was ordered.

(f) When the privileged communication was made during treatment that the patient was ordered to undergo to render the patient competent to stand trial on a criminal charge, but only with respect to issues to be determined in proceedings concerned with the competence of the patient to stand trial.

(4) In a proceeding in which subsections (2) and (3) prohibit disclosure of a communication made to a psychiatrist or psychologist in connection with the examination, diagnosis, or treatment of a patient, the fact that the patient has been examined or treated or undergone a diagnosis also shall not be disclosed unless that fact is relevant to a determination by a health care insurer or health care corporation of its rights and liabilities under a policy, contract, or certificate of insurance or health care benefits.

(5) Privileged communications may be disclosed pursuant to section 946 to comply with the duty set forth in that section. Mental Health Code Sec.

COUNTER-STATEMENT OF FACTS

Stanley Caruso is charged with second degree criminal sexual conduct MCL 750.520c(1)(a). Stanley Caruso, a family person with a wife and two children of his own, was charged following an accusation by his niece who was then eight years old. The child-complainant made the accusation by writing a note to her mother's live-in boyfriend.

Before trial, defense counsel moved to obtain the complainant's counseling records, for reasons that the complainant is a maladjusted, troubled child who suffered sexual abuse by her biological father before this allegation of abuse. Also, defense counsel has factual support that the note making the accusation was not the first she had given to her mother's boyfriend. Defense witness, Fred Davis, testified at Preliminary Examination about a sexually explicit letter the complainant wrote to her mother's live-in boyfriend, possibly as a joke:

> "She came down the stairs and handed Dave a note and she kind of ran upstairs chuckling or thought it was funny. It was a note, you know, she shouldn't have written. It had some words in it that she shouldn't even know. . . she had written that she wanted to have sex with him in the car. . ."

The complainant denied the existence of other notes except notes to say "I'm sorry." And on rebuttal the Prosecution introduced Dave Ecker, the boyfriend, as a new witness, who also denied the existence of other

notes except notes that said "I love you" and "just little kid stuff." (The majority of the court noted that further evidence of the note may be cumulative, but stated that cumulative evidence can be probative. Pet. 50a, n.44).

The circuit court granted defendant's motion and entered an order for production of the records for an *in camera* review. The Court of Appeals granted the prosecutor's interlocutory emergency motion for immediate consideration, but affirmed the trial court's order. Unpublished opinion per curium, issued May 25, 1993 (Docket No. 157437).

The Michigan Supreme Court granted an interlocutory leave to appeal with *People v Stanaway*. 444 Mich 875 (1993). The case was argued January 13, 1994, and decided August 29, 1994. *People v Stanaway*, 446 Mich 643 (1994). The Michigan Supreme Court held: the absolute statutory psychological-patient privilege must yield to a defendant's Constitutional Right of Due Process. The defendant having demonstrated a good faith belief, grounded in arguable fact, and that there is a reasonable probability that the records at issue contain material information necessary to his defense, the trial court on remand may order an in camera review of the complainant's counseling records.

Stanley Caruso's case has not yet gone to trial. The ability to prepare for and refute the

credibility of the complainant's accusation and testimony is essential to Stanley Caruso's right to a fair trial. Accordingly, Stanley Caruso respectfully requests this Court to dismiss the petition for certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

I. CERTIORARI SHOULD BE DENIED WHERE THE COURT BELOW BASED ITS DECISION ON INDEPENDENT AND ADEQUATE STATE GROUNDS, NAMELY THE MICHIGAN CONSTITUTION AND MICHIGAN CASE LAW.

The sole question presented is whether constitutional protections for the accused should be sacrificed by way of a rule of nondisclosure per se as a sympathetic response to the physical and emotional trauma suffered by victims. The Court should dismiss the petition for writ of certiorari to review the question as a matter of federal law, because the Michigan Supreme Court's decision is based upon independent and adequate state grounds. Therefore, this Court's jurisdiction fails.

Where the judgment of a state court rests on two grounds, one of which is federal and the other a state law ground, jurisdiction fails if state law ground is independent of the federal ground and adequately supports the judgment. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935), *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). The Court has jurisdiction in the absence of a plain statement that the decision below rested cn an adequate and independent state ground. *Michigan v. Long*, 463 U.S. 1032, 1044 (1983), *Coleman*, supra.

In the *Long* case, the Court held there was not independent and adequate state grounds where the court below had relied exclusively on federal cases; that

apart from two citations to the State Constitution, not a single state case was cited to support the state court's holding. *Long*, at 1043.

The current Michigan opinion is clearly distinguishable from *Long*. The Michigan Supreme Court, plainly states that its decision is based on state law:

> "However, our review of the jurisprudence of other states, along with our own precedent in dealing with discovery and evidentiary principles, coupled with a prudent need to resolve doubts in favor of constitutionality, prompts us to hold that in an appropriate case there should be available the option of an in camera inspection by the trial judge of the privileged record on a showing that the defendant has a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense." (Pet. 43a) (emphasis added).

Additionally, the Michigan Supreme Court, in holding that the statutory privilege must yield to the constitutional right of due process, cites numerous Michigan opinions (as well as federal):

> "Common-law and statutory privileges may have to be narrowed or yielded if those privileges interfere with certain constitutional rights of defendants. See, eg., *Davis*, *Ritchie*, *Roviaro*, *Lucas*, and *Nixon*[1], supra (even the executive privilege

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[1] *Davis v Alaska*, 415 US 308, 94 S Ct 1105, 39 L Ed 2d 328 (1975); *Pennsylvania v Ritchie*, 480 US 39, 107 S Ct 989, 94 L Ed 2d 40 (1987); *Roviario v United States*, 353 US 53, 77 S Ct 623, 1 L Ed 2d 639 (1957); *Michigan v Lucas*, 500 US 145, 111 S Ct 1743, 114 L Ed 2d 205 (1991); *United States v Nixon*, 418 US 683, 94 S Ct 3090, 41 L Ed 2d 1039 (1974).

> afforded the President must yield to due process demands in the administration of criminal justice); *People v. Adamski*, 198 Mich App 133; 497 NW2d 546 (1993); *Howe v Detroit Free Press*[2], supra, (the statutory privilege precluding access to probation reports must yield where it conflicts with certain constitutional rights); *People v Bellanca*, 386 Mich 708; 194 NW2d 863 (1972) (despite the need for secrecy the defendant has a right to a grand jury transcript in order to be prepared for cross-examination of the witnesses); *Davis v Lhim*, 124 Mich App 291; 335 NW2d 481 (1983) (endorsing the reasoning of *Tarasoff v Regents of Univ of California*, 17 Cal 3d 425; 131 Cal Rptr 14; 551 P2d 334 [1976], in finding that psychiatrists have a duty to warn third parties of the danger a patient may pose where threats have been made); *People v Mobley*, 390 Mich 57; 210 NW2d 327 (1973) (a codefendant who takes the stand against a defendant cannot claim the privilege against self-incrimination and avoid having his testimony and credibility tested by cross-examination); *People v Hunter*, 374 Mich 129; 132 NW2d 95 (1965) (if the prosecution submits medical proof in a rape case, the submission operates as an admission that there will not be an assertion of any privilege when rebuttal medical testimony is offered); *In re Baby X*, 97 Mich App 111; 293 NW2d 736 (1980) (a parent's right to confidentiality in drug treatment records must yield if a court determines that the records are necessary and material to the state's proof of neglect in a child neglect proceeding); *People v. Walton*, 71 Mich App 478; 247 NW2d 378 (1976) (confidential statements made to the police by witnesses should be inspected in camera to determine whether fundamental fairness requires that the defendant have access to the information in order to prepare his defense). (Pet. 33a-34a)(emphasis added).

Based on the foregoing language from the Michigan Supreme Court, and particularly the statement that the

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[2] 440 Mich 203; 487 NW2d 374 (1992).

Michigan Supreme Court relied on Michigan discovery and evidentiary principles, which give criminal defendants broad rights of discovery[3], we can only conclude that the decision was based on independent and adequate state grounds.

II. CERTIORARI SHOULD BE DENIED WHERE THE MICHIGAN SUPREME COURT PROPERLY DECIDED AS A MATTER OF DUE PROCESS THAT THE IN CAMERA INSPECTION OF PRIVILEGED RECORDS SHOULD BE AVAILABLE IN AN APPROPRIATE CASE IN ACCORDANCE WITH APPLICABLE FEDERAL CASE LAW AND THE DECISIONS OF THE MAJORITY OF THE STATES.

The United States Supreme Court has on several occasions ruled that privileges must yield to constitutional rights of defendants, See, e.g., **United States v Nixon**, supra (even the executive privilege afforded the President must yield to due process demands in the administration of criminal justice), and **Roviaro v United States**, supra (an absolute privilege to withhold disclosure of the identity of an informant must give way if the informant's identity or communications are essential to a fair trial). The Michigan Supreme Court relied on these decisions in addition to the decisions of the majority of the states. (See Pet. 36a, n.29, for a survey of these cases).

For decades, this Court has recognized the propriety of balancing state policies and constitutional

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[3] Indeed the trend in Michigan and other states is toward broad criminal discovery, and the prosecutor is not merely a participant in the contest of trial but has a duty to seek justice. **People v Browning**, 108 Mich App 281, 310 NW2d 365,377 (1981).

interests. However, petitioners argument that the Court should make an absolute rule against disclosure departs from established rules of law. Absolutes do not work in courts of law; courts must look at the particular circumstances of each case:

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case. . . *Roviaro*, supra at 628, 629.

This Court has decided in *Ritchie*, supra, that an *in camera* review by the trial court will serve both the Constitutional Right of the defendant and the need for confidentiality.

The majority of the state supreme courts have likewise decided in favor of a balanced approach to protecting Constitutional Rights and statutory privileges. (See Pet. 36a, n.29, for a survey of these cases.) It appears two state supreme courts have taken away the constitutional protections of the accused: Illinois in *People v Foggy*, 121 Ill 2d 337; 521 NE2d 86 (1988), and Pennsylvania in *Commonwealth v Wilson*, 529 Pa 268, 278 ; 602 A2d 1290 (1992). However, even these states are not without their reservations. In *Foggy*, the Illinois Court gave two reasons for denying the defendant's request, the first being the public policy against disclosure, and the second was the fact that the

defendant had failed to show that the files contained relevant information. *Foggy*, at 750. In *Wilson*, supra, a strong dissenting opinion shows grave concern for the ruling of the majority:

> "*The hallowed principle that one remains innocent until proven guilty is hollow indeed if one's constitutional rights must always bend to a statutory privilege . . .*
> I am gravely concerned that we have lost all sense of what our constitutional rights guarantee.
> . . .
> That the legislative response . . was swift and empathetic to the rape victim does not relieve this Court of our responsibility to declare unconstitutional rights. *The Constitution of this Commonwealth is the absolute--a legislative enactment of a statutory privilege is not.* Id. at 1299, 1300 (emphasis added).

This Court relied on the same principle in its *Nixon* decision, as did the Michigan Supreme Court:

> "Whatever their origins, these exceptions [privileges] to the demand for every man's evidence are not lightly created nor expansively construed, for these are in derogation of the search for truth." (footnote omitted), *Nixon* at 710; (Pet. 26a).

Recognizing that relevant evidence shields the truth, increasing the danger of convicting an innocent person, the Michigan Supreme Court resolved the matter in favor of constitutionality. (Pet. at 26a)

Petitioner's argument that the Michigan Supreme Court erred in its application of the *Ritchie* case is without merit; the Michigan Court gave the respondent no more rights than this Court did in Ritchie. Petitioner's argument that the Michigan Court

"created" a constitutional right is off base. If due process is a "created" right, then this Court will have numerous additional cases to reconsider after this one. The only thing the Michigan Court "created" in its opinion is an absolute privilege out of a statute that in fact contains exceptions.[4]

For all of the above reasons the respondent maintains the statutory privilege must yield to the Constitutional right of due process. A contrary decision would be a dangerous precedent.

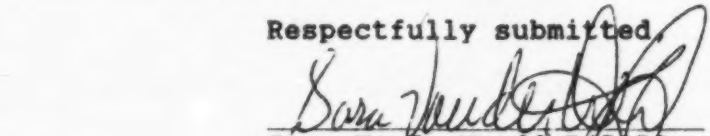
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[4]Section 750(2) of the statute provides: Privileged communications shall not be disclosed in civil, criminal, legislative or administrative cases or proceedings, unless the patient has waived the privilege except in the circumstances set forth in this section. MCL 330.1750(2); MSA 14.800(750)(2) (emphasis added); *See also* "Statute Involved," for complete text of exceptions.

CONCLUSION

WHEREFORE, Respondent, Stanley H. Caruso, respectfully prays that this Court dismiss the Petition for Certiorari, and uphold the Michigan Supreme Court opinion that in an appropriate case there should be available the option of an in camera inspection by the trial judge of the privileged record on a showing that the accused has a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense.

Respectfully submitted,



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